Supreme Court, U.S.
FILED
DEC 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-789

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPH J. HIEGEL

Petitioner,

VS.

STEVE HILL, MARVIN OWEN AND
THE CITY OF HOT SPRINGS

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

MICHAEL R. RAINWATER*
GILL, SKOKOS, SIMPSON,
BUFORD & GRAHAM, P.A.
300 Superior Federal Building
Capitol at Broadway
Little Rock, AR 72201
(501) 374-1107

Attorney for Respondents
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (203) 347-8203

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
I. TABLE OF AUTHORITIES	ii
II. STATEMENT OF THE CASE	1
III. REASONS FOR DENYING THE WRIT	3
The Court of Appeals did not err in affirming the District Court's finding that: "Officer Hill used such physical force as he reasonably believed necessary to defend himself under the circumstances	3
The Court of Appeals did not err in affirming the District Court's finding that Deadly Force was not used by Officer Hill	6
IV. CONCLUSION	8

TABLE OF AUTHORITIES

CASES	Page
Mills v. Smith, 656 F.2d 337 (8th Cir. 1981)	4
Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981)	3
Putman v. Gerloff, 639 F.2d 415 (8th Cir. 1981)	8
Roberts v. Marino, 656 F.2d 1112 (5th Cir. 1981)	8
Robinson v. Moreland, 655 F.2d 887 (8th Cir. 1981)	4
TEXTS:	
Prosser on Torts, 4th Ed.	5
STATUTES:	
Ark. Stat. Ann. § 41-501(5)	7
Ark. Stat. Ann. § 41-506	4, 7
Ark. Stat. Ann. § 41-507	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-789

JOSEPH J. HIEGEL,

Petitioner,

VS.

STEVE HILL, MARVIN OWEN AND
THE CITY OF HOT SPRINGS,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

STATEMENT OF THE CASE

In his Petition for Writ of Certiorari, Petitioner related none of the facts concerning the alleged unconstitutional conduct of Respondents stating merely that "an altercation ensued in which Officer Hill struck the Plaintiff in the head with a heavy metal flashlight . . . .". The circumstances of this "altercation" are critical because the legal issues the

Petitioner presents for review are actually questions of fact and not questions of law.

Officer Hill, alone, was escorting two prisoners to Officer Hill's patrol car from the Sheriff Department's breathalizer test facility. The prisoners were the Petitioner, Joseph Hiegel, and Loretta Hecker. At the patrol car, Officer Hill placed Hecker, who was intoxicated, into the car. Hiegel was at the Officer's side. With Hecker sitting on the rear car seat on the driver's side, Officer Hill turned to assist Hiegel into the car. Officer Hill was standing in the "V" created by the open car door and the car itself with Hecker behind him and Hiegel before him. Just as Officer Hill turned to assist him, Hiegel pushed Hill backwards and, with his right fist, hit Officer Hill in the face knocking Hill off his feet backwards into the lap of the female prisoner. Officer Hill was attacked in the dark; he was surprised; he was trapped between two prisoners; he was pushed off balance; and he was in risk of losing consciousness. He was fearful of and in imminent danger of losing his gun to a prisoner; he was unable to retreat; and he was physically limited in his response because he was caught in a triangle of the open car door to his right, the female prisoner sitting in the car behind him and the attacker before him. The prisoners fore and aft collectively had an opportunity to use deadly force by drawing the Officer's weapon. The prisoners' opportunity to use the Officer's weapon against the Officer was imminent. The action/reaction occurred instantaneously such that Officer Hill had no specific intent, knowledge or any other formulated state of mind. Officer Hill reacted instinctively and reflexively. Officer Hill swung at the attacker, not at the attacker's head.

Officer Hill had to swing over the vehicle door resulting in a swing that was high and which made contact with the attacker's head. Officer Hill had no knowledge of any other officers being present and, in fact, there were no officers in a position to assist Officer Hill. Officer Hill swung only once ceasing all force upon cessation of Mr. Hiegel's attack. Officer Hill secured Ms. Hecker immediately after striking Hiegel and before assisting Hiegel due to his concern for Hecker's position behind him. Officer Hill was not surrounded by any zone of safety and there was a deadly weapon present — Officer Hill's service revolver. Per the Plaintiff's expert witness, Officer Hill had an 80% chance of being shot if he lost his weapon. Officer Hill is a well trained police officer who reacted under split-second circumstances. At trial, the Plaintiff's expert could not specify any alternative action for Officer Hill.

REASONS FOR DENYING THE WRIT

The Court of Appeals Did Not Err In Affirming The District Court's Finding That: "Officer Hill Used Such Physical Force As He Reasonably Believed Necessary To Defend Himself Under The Circumstances."

Petitioner contends that the Court of Appeals erred in affirming the District Court because: "employment of the objective or 'reasonable man test' is well settled in basic tort law." (Petitioner's Writ, p. 8) Petitioner's argument is misdirected for two reasons. First, this is a civil rights case, not a tort case. The issue in this 42 U.S.C. § 1983 action is not negligence but due process. *Parratt v. Taylor*, 451 U.S. 527,

544, 101 S. Ct. 1908, 1917 (1981); *Mills v. Smith*, 656 F.2d 337, 340 (n.2) (8th Cir. 1981). Secondly, even "the reasonable man" is held to a subjective standard in an emergency.

Plaintiff received exactly the "process" which was "due" him per Arkansas' justification statutes. Ark. Stat. Ann. § 41-506 states:

> A person is justified in using physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force that he reasonably believes to be necessary. However, he may not use deadly physical force except as provided in § 41-507.

Ark. Stat. Ann. § 41-507 states:

> A person is justified in using deadly physical force upon another person if he reasonably believes that the other person is using or about to use unlawful deadly physical force.

The District Court stated (District Court Opinion, p.8):

> The Court is of the opinion that Officer Hill used such physical force as he reasonably believed was necessary to defend himself under the circumstances. Such force is justified under Ark. Stat. Ann. § 41-506. Because justifiable force was used, there was no violation of Mr. Hiegel's rights under 42 U.S.C. § 1983.

Since the court found, as a matter of fact, that the force was justified per Arkansas law, the Plaintiff was not denied "due process." *Robinson v. Moreland*, 655

F.2d' 887, 890 (8th Cir. 1981) The Plaintiff did not challenge the constitutionality of Arkansas' justification statutes.

Even if tort principles were to be applied, "the reasonable man" standard has not been violated. Plaintiff quotes Prosser on Torts, 4th Ed. at page 149. Prosser on Torts, 4th Ed. at page 151 says:

> Conduct of the reasonable man will vary with the situation with which he is confronted. A jury must therefore be instructed to take the circumstances into account; negligence is the failure to do what the reasonable man would do "under the same or similar circumstances." Under the latitude of this phrase, the courts have made allowance not only for the external facts, but for many of the characteristics of the actor himself, and have applied, in many respects, a more or less *subjective* standard.

Also, Prosser on Torts, 4th Ed., at page 168, states:

> The Courts have been compelled to recognize that an actor who is confronted with an emergency is not to be held to the standard of conduct normally applied to one who is in no such situation. An emergency has been defined as a sudden or unexpected event or combination of circumstances which calls for immediate action; and although there are courts which have laid stress upon the "instinctive action" which usually accompanies such a situation, it seems clear that the basis of the special rule is merely that the actor has left no time for thought or is reasonably so disturbed or excited, that he cannot weigh alternative courses of action and must make a

> speedy decision, based very largely upon impulse or guess. Under such circumstances, the actor cannot reasonably be held to the same conduct as one who has had full opportunity to reflect, even though it later appears that he made the wrong decision, which no reasonable man could possibly have made after due deliberation. His choice may be mistaken and yet prudent.

The District Court found as a matter of fact that Officer Hill was confronted with an emergency. The District Court (District Court Opinion, p.4) stated:

> He did not have time to think but felt he was in a dangerous position and instinctively struck out with his flashlight. When he struck out he was not aiming at any particular spot.

Although posed as an issue of law, the Petitioner's first proported reason for granting the Writ is merely an attempt to get this Court to review the "under the circumstances" facts found by the District Court and affirmed by the Court of Appeals. Such is not a permissible basis for review by the Supreme Court and the Petitioner's Writ for Certiorari should, therefore, be denied.

The Court Of Appeals Did Not Err In Affirming The District Court's Finding That Deadly Force Was Not Used By Officer Hill.

Petitioner next contends the District Court erred in not using the phrase "excessive force." Petitioner finds fault with the District Court and the affirmance by the Court of Appeals because the District Court analyzed the facts in terms of Arkansas' Justification

Statutes which categorize force as non-deadly force and deadly force.

Ark. Stat. Ann. § 41-501(5) defines deadly physical force as:

> Physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury.

Again, the constitutionality of Arkansas' Justification Statutes was not challenged by the Petitioner.

The District Court found that Officer Hill used non-deadly force. But, Petitioner contends that the District Court failed to consider whether or not the Officer's non-deadly force was "excessive" under the circumstances. Petitioner quotes only part of the District Court's Opinion in support of his contention that the court considered only the issue of whether or not deadly force was used. The District Court first said (District Court Opinion, p. 7):

> Because Officer Hill did not intend to cause serious physical injury, deadly force as defined under the statute was not used.

Then, after discussing the circumstances under which the force was used, including the intent of the Officer, the District Court said (District Court Opinion, p. 8):

> The Court is of the opinion that Officer Hill used such physical force as he reasonably believed was necessary to defend himself under the circumstances. Such force is justified under Ark. Stat. Ann. § 41-506. Because justifiable force was

used, there was no violation of Mr. Hiegel's right under 42 U.S.C. § 1983.

Thus, the District Court, in its final analysis, did not limit itself to any "deadly force" or "non-deadly force" labels. Rather, the District Court considered whether or not the force used was "reasonably necessary" for the Officer to defend himself "under the circumstances" and the District Court, sitting as jury, found that it was. *Roberts v. Marino*, 656 F.2d 1112, 1114 (5th Cir. 1981) *Putman v. Gerloff*, 639 F.2d 415, 420 (8th Cir. 1981).

As with the first issue, Petitioner seeks to have the United States Supreme Court adopt his view of what was "reasonable under the circumstances" instead of the view adopted by the District Court and the Court of Appeals. Review of such a fact question is not a permissible basis for appeal to the United States Supreme Court. The Petitioner's Writ should be denied.

CONCLUSION

The District Court committed no error. It simply applied the law to the "under the circumstances" facts. At no time did the Petitioner contest the constitutionality of Arkansas' Justification Statutes. The Court of Appeals did not err in affirming the District Court. To the contrary, the Court of Appeals (Court of Appeals Opinion, p.2) "carefully reviewed the record" and concluded that there were no clearly erroneous findings of fact and that "no error of law appears." Under the circumstances, Officer Hill's conduct was found to be "reasonable" and therefore

the force applied was not "excessive." Thus, the Petitioner's right to be free from excessive physical force by police officers as guaranteed by the liberty provision of the due process clause of the Fourteenth Amendment to the United States Constitution was not violated. The decision of the Court of Appeals is not in conflict with the decision of any other Federal Court of Appeals on the same matter. No federal question was decided in a way in conflict with any state court of last resort. The findings below have not departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision. Neither the opinion of the District Court nor the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court. The lower court opinions are not in any way in conflict with any applicable decision of this Court. The Petition for Writ of Certiorari of Joseph J. Hiegel, Petitioner, should be denied.

Respectfully Submitted,

MICHAEL R. RAINWATER
Gill, Skokos, Simpson, Buford & Graham, P.A.
300 Superior Federal Building
Capitol at Broadway
Little Rock, AR 72201
(501) 374-1107
Attorney for Respondent